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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 165

THE BORIN CORPORATION, formerly Zero Ice Corporation,
Petitioner (Appellant Below),
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent (Appellee Below)

PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1-10
Opinions Below	2
Basis of Jurisdiction	2
Summary Statement of the Matter Involved	2-8
The Board's reasons for rejecting its own Findings of Fact	5-6
The reasons of the Circuit Court of Appeals for rejecting the Board's Findings of Fact	6-8
Reasons Relied Upon for Allowance of the Writ	8-10
Brief in Support of Petition for Writ of Certiorari	11-24
Opinions of the Courts Below	11
Jurisdiction	11
Statement of the Case	11
Specification of Errors	12
Argument	12-23
(a) Preliminary Statement	12-13
(b) The Refusal of the Circuit Court to Adopt the Facts as Found by the Board	13-20
(c) The Rule Relating to Parol Evidence Cannot Be Invoked by a Stranger to the Instrument	20-23
Conclusion	23-24

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INDEX TO AUTHORITIES CITED

	Page
Avery v. Commissioner (C. C. A. 5), 22 Fed. (2d) 6	13
Belridge Oil Co. v. Helvering (C. C. A. 9), 69 Fed. (2d) 432	13
Holmes and Brewster's Federal Tax Appeals, 1927, page 320	21
Jones' Commentaries on Evidence, 1926, Vol. 3, p. 2711	22
McMaster v. Insurance Co., 55 N. Y. 222	22
O'Shea v. N. Y., C. & St. L. R. Co., 105 Fed. 559 at p. 563 (C. C. A. 7)	23
Paul and Merten's Income Tax, Vol. 5, Sec. 43.74	20-21
Paul and Merten's Income Tax, Vol. 2, Sec. 11.49	21
Powers Manufacturing Co. v. Commissioner (C. C. A. 8), Fed. (2d) 225	13
Prairie Oil & Gas Co. v. Motter, 66 Fed. (2d) 309 at 311 (C. C. A. 10)	14
Sigua Iron Company v. Greene, 88 Fed. 207 (C. C. A. 2nd)	21
Tracy, et al., v. Commissioner (C. C. A. 6), 53 Fed. (2d) 575	13

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PETITION FOR WRIT OF CERTIORARI

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record; italics supplied)

To the Honorable, The Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

The petitioner above named prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Sixth Circuit affirming the decision of the United States Board of Tax Appeals redetermining deficiencies against the petitioner in income and excess profits taxes determined by the respondent.

1. OPINIONS BELOW

The opinion of the Board of Tax Appeals appears on page 22, and the opinion of the Circuit Court of Appeals appears on page 96 of the record.

2. BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

The decision of the Circuit Court of Appeals was entered on February 14, 1941. A petition for rehearing was duly filed and denied without opinion on March 14, 1941.

3. SUMMARY STATEMENT OF THE MATTER INVOLVED

The suit involves the single question of the actual basis of cost to the petitioner of certain machinery and equipment (collectively referred to as the "Plant") for the manufacture of dry ice (solid carbon dioxide gas), purchased by the petitioner from the York Ice Machinery Corporation. If the cost of the plant was the sum of $146,800, the contract price stipulated in a formal written contract dated October 10, 1930 (Exhibit 1, R. 39, 53) between the vendor and the petitioner for the sale and

installation of the plant by the York Corporation, there is no deficiency in taxes. This was, as is shown in the brief, the actual cost according to the findings of fact of the Board of Tax Appeals.

Subsequent to completion of installation *and after acceptance of the plant* by the petitioner (Opinion of Board, R. 25) its performance proved to be inadequate and unsatisfactory, in breach of the warranty in the contract that the plant would produce ten tons of dry ice per twenty-four hour day.

Through the efforts of the engineers of the vendor exerted for eighteen months after the time of acceptance, the defects were remedied in November, 1932, and at such time, the plant was acknowledged to be in accordance with the warranty contained in the contract. In the meantime, however, large damages had been sustained through the delay which were the subject of protracted and controversial negotiations between the parties. The Board found, as a fact, that damages had been sustained by the petitioner, and that the negotiations had culminated in an agreement made in Detroit by the representatives of the York Corporation to pay the sum of $84,800 as damages for breach of warranty and that the settlement was to be effectuated by the sending from York, Pennsylvania, of a credit memorandum against the balance of $132,800 then owing after the payment of $12,000 initially made when the contract was signed. Instead, however, of such credit memorandum being sent, the York Corporation telephoned and "expressed the desire to dispose of the matter through the execution of a new contract which would definitely fix the liabilities and rights of the parties with respect to the said machinery" (Opinion of Board, R. 27). Only this telephone call intervened. The petitioner *immediately assented* "because we got our full credit for the $84,800, which we had lost under the first contract" (R.

45). It was not suggested by the respondent or found by the Board that the adoption of this method of effectuating the settlement, arose from *any change in the purpose of the parties* that a credit for damages in the amount of $84,800 should be allowed against the stipulated purchase price. An agreement dated November 7, 1932 (Ex. 7, R. 46, 77) was signed, purporting to sell the plant for $72,467, of which the sum of $12,000, actually paid over two years before when Exhibit 1 was signed, was then acknowledged to be paid, and reciting a remaining obligation of $60,467. The purported balance of $60,467 was shown to include a liability of $10,467 (R. 46) to the York Corporation arising out of an entirely independent transaction. The declared purchase price of $72,467 was, as found by the Board, the actual balance owing under the first contract, after crediting the damages in the amount of $84,800 and after debiting against the petitioner the liability independently arising of $10,467.00; and the formal books of the York Corporation and the testimony of its officers confirm the fact (R. 47) that there was a continuation of the original liability, as reduced by the credit for damages, and that no new sale was made. The plant having finally been acknowledged to be in conformity with the warranty in the original contract, there was no reason why the purchase price originally calculated should not have been, as it was, the basis for calculating the residual liability declared in the agreement of settlement.

The agreement of settlement omitted the warranty as to quantity and quality of production which had given rise to the controversy and carried a final statement that the rights of the parties under the former contract be mutually cancelled and that it be rescinded. It also repeated some of the provisions of the first agreement with respect to apparatus *to be furnished* and other terms which then mainfestly had no application or relevancy to a completely executed contract.

The Board's Reasons for Rejecting Its Own Findings of Fact

It was provided by the first contract that in the event of breach of warranties the damages be restricted to direct damages and not consequential damages. The Board found (Opinion of Board, R. 30),

> "Even *though the sum of $84,800 as damages was agreed to* * * *, many of the items making up that sum may not reasonably be classified as direct damages as contrasted with consequential damages."

From this fact alone, and in denial of the express finding that such sum of $84,800 was the agreed damages, the Board derives,

> "* * * an obvious inference that the York Corporation is not liable for damages, but realizing and recognizing the difficulties which had been encountered by its first purchaser of dry ice machinery, had agreed in the contract of November 7, 1932 to a reduced purchase price for the plant." (Opinion of Board, R. 29).

The only valid inference from the execution of the second agreement *consistent with the facts as found* is that the parties intended to state the account then existing arising from all purposes; accordingly, the obligation in the first agreement which had been superseded by the stated obligation in the second agreement was of necessity "mutually cancelled and rescinded." The appearance of these words, however, are expressly accepted by the Board as proving that the sum of $84,800 was a reduction of the purchase price and that the actual cost was $62,000.00. This language is made to support a conclusion that *the sale and purchase itself which had been completed and executed two years before* had in some way been destroyed. The deficiencies in taxes claimed by the

respondent arise from the larger net gain realized upon resale and the smaller depreciation allowed during the period of ownership on the basis of a cost of $62,000.00 instead of $146,800.00.

The Reasons of the Circuit Court of Appeals for Rejecting the Board's Findings of Fact

No attempt is made by the Circuit Court of Appeals to show that the form used to give expression to the residual rights and liabilities resulting from the settlement *was inconsistent with the purposes intended to be accomplished by the parties as found by the Board. The finding that damages were suffered, that they were agreed upon and that they were allowed, is not challenged by resort to anything appearing in the record.*

The Circuit Court of Appeals appears to invoke in this controversy between a third party to the agreement, namely the respondent, and the petitioner, the rule relating to parol evidence, in deviation of the well-settled principle that in a controversy involving a stranger, this rule of estoppel has no application. The Court says, invoking the bare language of the agreement and *expressly disregarding all antecedent evidence and findings* proving the substance of the transaction:

> "* * * under elementary rules of law the previous negotiations were merged. This contract deliberately executed, shows that the York Corporation did not, as contended, agree that the petitioner had an enforcible claim against it for $84,800 * * * the purpose of the contract is found in the agreement of the parties."

It must be confessed, however, that the other reasons of the Circuit Court of Appeals are obscure. The Court says (R. 100),

> "The York Corporation was *unwilling* to give a credit memorandum in this amount and *insisted* that the matter be disposed of through the execution of a new contract."

This recital of fact is without any support in the findings of fact or the opinion, or elsewhere in the record. There is no suggestion that the York Corporation was "unwilling" to give a credit memorandum or that it "insisted" on a new contract. Such an implication that the parties intended a different legal result from that which would follow a credit memorandum, is directly contrary to the intention of the parties as shown by the evidence and to the findings of the Board. The Court's statement that (R. 100) "the York Corporation *at no time admitted* that it was liable under the contract for $84,800," is not only the direct opposite of all the evidence but a summary rejection of the Board's finding of fact that there was an express agreement to pay damages in the amount of $84,800 arrived at after the most contentious and protracted negotiations; nor is it possible to find any support for the statement (R. 100) "as part of that adjustment, the York Corporation sold and the petitioner bought the plant at a greatly reduced figure."

Equally inexplicable is the statement (R. 101) that the petitioner "contends that the subsequent agreement did not carry the legal consequences which attach to the language employed by it." It is manifest from the petitioner's entire presentation that its contention is the direct contrary of that ascribed to it. The crux of its argument is that the first agreement having been completely executed by the York Corporation, there remained only the obligation to pay the residual balance; and that the legal consequences of the second agreement acknowledging liability for such residual balance were precisely *the same legal consequences* which flowed from the agreement to allow a

credit of $84,800 against the stipulated purchase price. Surely a purported obligation calling for a sale and installation by the York Corporation, which had in fact long before been completely executed by the obligor, could not be termed a change in the legal consequences.

The agreement on the part of the York Corporation to sell and install the plant having been completely executed, the error of law into which the Court has fallen is self-evident from the following statement in its opinion, R. 99:

> "Although the buyer acknowledged that the plant conformed to the specifications, *since no deferred payment was made,* title was retained by the seller, and did not vest in the buyer until completion of the payments provided for in the new contract of 1932. The principal agreements of the contract of 1930 still remained unexecuted."

The title was retained under the first contract as well, and the deferred payments were withheld because of the admitted breach of warranty. It is submitted with respect that the security retained by the York Corporation in the form of a legal title did not prevent the contract from becoming completely executed on its part.

4. REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

(1) The decision of the Circuit Court of Appeals is in conflict with the decisions of all other Circuit Courts of Appeals, holding that the findings of fact of the Board of Tax Appeals is binding and conclusive upon an Appellate Court where supported by evidence.

(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of all other Circuit Courts of Appeals, holding that the rule relating to parol evidence

has no application in a controversy involving a stranger to a contract.

(3) The decision of the Circuit Court of Appeals is a decision on an important question of federal law in conflict with applicable decisions of this Court, holding that the findings of fact of the Board of Tax Appeals is binding and conclusive upon an Appellate Court if supported by evidence.

(4) The decision of the Circuit Court of Appeals is a decision on an important question of Michigan law probably in conflict with local decisions, holding that a stranger to a contract cannot invoke the parol evidence rule for the purpose of preventing an inquiry into the real purpose and circumstance of the transaction.

(5) The decision of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure on petitions to review a decision of the Board of Tax Appeals, insofar as the substance of the transaction has been rejected in favor of its supposed form, as to call for an exercise of this Court's power of supervision.

Wherefore petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination, as provided by the statutes of the United States, a full and complete transcript of the Record and all proceedings in the case numbered and entitled on its docket "No. 8477, The Borin Corporation, formerly Zero Ice Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent," and that the judgment therein of the said Circuit Court of Appeals be reversed by this Court, and that your peti-

tioner may have such other and further relief in the premises as to this Court may seem just and proper.

THE BORIN CORPORATION, formerly
Zero Ice Corporation.
By THEODORE LEVIN,
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Dated: June 5, 1941.

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